

ORIGINAL

IN THE SUPREME COURT OF OHIO

IN RE: ANTWON C.,
 a minor child

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Case No. **09-1307**

On Appeal from the Hamilton
County Court of Appeals
First Appellate District

C.A. Case No. C080847

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT ANTWON C.

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EXPLANATION OF WHY THIS CASE IS ONE OF PUBLIC OR GREAT GENERAL INTEREST AND INVOLVES A SUBSTANTIAL CONSTITUTIONAL QUESTION

If the First District Court of Appeals decision stands and other Courts of Appeals adopt its holding, children who have been adjudicated delinquent and sentenced for a sexual offense, will lose their right to immediately appeal their adjudication and sentence if the juvenile court chooses to continue their sex offender classification hearing until a later date. Because the First District's opinion has such a drastic effect on a child's right to appeal, this Court must take the opportunity to protect children's rights and correct this error now.

Further, if this Court takes this case, it will have the opportunity to clarify the effect of Juvenile Rule 35 on probation revocation hearings in juvenile delinquency proceedings. Specifically, Juv.R. 35(A) provides the process by which a juvenile court may proceed when it is alleged that a child has violated a requirement of his probation. And, arguably, when that process is not followed, a juvenile court does not have jurisdiction to proceed.

In Ohio, there are three distinct stages of proceedings for most children who are alleged to have committed a sexual offense—adjudication, disposition, and sexual offender classification—and each is governed by its own juvenile rule or statute. If a child is placed on probation as part of his disposition, and he is later alleged to have violated his probation, a separate probation revocation proceeding is held to determine if the child violated a term of his probation of which he had been properly notified. Juv.R. 35. A probation revocation hearing can not occur until after a court has entered a complete judgment which places the child on probation. See *In re L.A.B.*, 121 Ohio St.3d. 112, 2009-Ohio-354, ¶¶48-49; Juv.R. 35.

For juvenile sex offender classification hearings, R.C. 2152.83 gives a juvenile court the authority to invoke its own jurisdiction, and to determine a sexual offender classification *either*

at the time of disposition or upon release from a secure facility. Because R.C. 2152.83 permits the juvenile court to conduct the classification hearing after the dispositional hearing, it is clear that the classification hearing is a separate proceeding. And, a court's determination to hold a sexual offender classification hearing after disposition has no bearing on the court's ability to enter a final disposition that is separate from the juvenile sex offender classification. But, by refusing to apply Juv.R. 35 to the proceedings below, the First District has combined two distinct proceedings, thereby eliminating a final appealable order. Combining the two proceedings has a perilous affect on a juvenile's right to appeal and is not supported by the Ohio Rules of Juvenile Procedure, the Ohio Revised Code, or by Due Process.

Instead of addressing the applicability of Juv.R 35 to Antwon's case, the First District found that because Antwon was awaiting a juvenile sex offender classification hearing, the dispositional order that placed him on probation and committed him to a residential treatment facility was not a "complete judgment," and therefore, the juvenile court had the authority to order Antwon to appear in court without any notice as to the purpose of the hearing and to commit him to DYS for violating the court's previously imposed dispositional order. The First District's reasoning is flawed and sets a dangerous precedent that infringes upon a juvenile sex offender's due process rights, and upon his right to appeal because it significantly delays the time when a juvenile sex offender can appeal his case. If the First District's decision stands, any time a juvenile sex offender is committed to DYS and the court continues the classification hearing until the child is released, that child will be precluded from appealing his adjudication and disposition until after he has served his sentence and the juvenile court holds a sexual classification hearing.

This dangerous precedent can not be resolved without this Court's guidance. But, the problem can be cleanly addressed now, following Antwon's direct appeal. If the First District's decision stands, juvenile sexual offenders in Hamilton County will have no choice but to pursue their claims through state habeas actions. Furthermore, although this Court generally prefers to wait to address an issue until other district courts have grappled with it, this case creates a procedure that is unsupported in law and that warrants this Court's attention now. Stated plainly, unless or until the Supreme Court Commission on the Rules of Practice and Procedure in Ohio Courts determines that Juv.R. 35(A) must be amended in cases that involve a juvenile sex offender who is awaiting juvenile sex offender classification, the rule must be applied as written. And even then, it will only cure the errors relating to the application of Juv.R. 35. Because this case is of public and great general interest and involves a substantial constitutional question, Antwon C. urges this Court to accept jurisdiction.

STATEMENT OF THE CASE AND FACTS

In October of 2005, Antwon was adjudicated delinquent of gross sexual imposition, in violation of R.C. 2907.05, a felony of the third degree if committed by an adult. In re Antwon C., 2009-Ohio-2567, 1st Dist. No. C-080847, ¶¶1-2. For disposition, the court placed Antwon on probation, ordered him to attend and complete a residential sex offender treatment program, and suspended a commitment to the Ohio Department of Youth Services (hereinafter “DYS”). *Id.* Two weeks after the court entered disposition, Antwon fled to Florida. *Id.*

While in Florida, Antwon was involved in an incident which resulted in him being sentenced to a residential treatment facility for approximately two years. *Id.* at ¶3. After Antwon successfully completed the residential portion of the Florida program, he was placed on probation in Florida. *Id.* While there, Antwon graduated from high school, obtained employment, and enrolled in college. *Id.*

In June 2008, Antwon drove to Cincinnati to visit his brother who was in critical condition from a car accident. *Id.* at 4. While driving back to Florida through Georgia, he was pulled over for speeding and was informed that there was an outstanding warrant for him in Ohio. Thereafter, on June 25, 2008, the Hamilton County Juvenile Court issued a simple summons and order for Antwon to appear for a hearing. It also issued a notice that a juvenile sex offender classification hearing was scheduled to take place in July.

In July 2008, the court held a juvenile sex offender registrant classification hearing. *Id.* at ¶4. At the conclusion of the hearing, the court labeled Antwon a Tier II offender and continued the matter for “disposition.” *Id.*

In August, after the sex offender classification hearing, the court held what it referred to as two “dispositional hearings.” At the first hearing, the court heard recommendations as to what

disposition to impose, and stated that it was going to “print and serve [Antwon] with a notice of possibly invoking the commitment that has been suspended on the charge of gross sexual imposition on 05-14749.” (August 6, 2008, T.p. 13). But, the court never issued this “notice” and the State never filed a motion to invoke the court’s jurisdiction (also referred to as a “probation violation”) pursuant to Juv.R. 35(A). Notwithstanding these facts, at conclusion of the second hearing, the court imposed the previously suspended commitment to DYS. *Id.*

On appeal, Antwon averred that the juvenile court was without jurisdiction to impose Antwon’s suspended DYS commitment because the juvenile court wholly abandoned its duties and failed to comply with the requirements of Juv. R. 35(A) and (B). *Id.* at ¶5. But in its decision, the First District held that Juv.R. 35 was not applicable to Antwon’s case because the juvenile court had not “reached a complete judgment.” *Id.* at ¶7. It reasoned, that because Antwon fled to Florida before the court made a determination as to his sexual offender classification, the trial court was “unable to address the final aspect of the case[; t]hus, the court was not required to comply with Juv.R. 35.” *Id.* ¶8. Accordingly, the court overruled Antwon’s first assignment of error.

Because the First District neglected to consider the significance of Juv.R. 35, Antwon asked the court to reconsider its decision in light of this Court’s recent decision in *In re J.F.*, 121 Ohio St. 3d 76, 2009-Ohio-318, which affirmed and remanded *In re J.F.*, Greene App. No. 06-CA-123, 2007-Ohio-5652. The First District declined to reconsider its opinion. This appeal timely follows.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

PROPOSITION OF LAW

A juvenile court must comply with Juvenile Rule 35 before it can revoke a child's probation and impose a suspended commitment to a secure facility.

Without question, "the basic requirements of due process and fairness" apply to juvenile delinquency proceedings. *In re L.A.B.*, 121 Ohio St.3d 112, 2009-Ohio-354, at ¶54, quoting *Kent v. United States* (1966), 383 U.S. 541, 86 S.Ct. 1045. In Ohio, the process for revoking a child's probation is provided in Juv.R. 35(A):

Proceedings after judgment

(A) **Continuing jurisdiction; invoked by motion.** The continuing jurisdiction of the court shall be invoked by motion filed in the original proceeding, notice of which shall be served in the manner provided for the service of process.

Juv.R. 35(A) (emphasis in original). The process by which a juvenile court can revoke a child's probation is the same for children who have committed a sex offense and are awaiting sex offender classification, and for those who have committed non-sexual offenses.

In this case, the juvenile court erred because it failed to follow the rudiments of Juv.R. 35 before it imposed a previously suspended commitment to the DYS. Specifically, under Juv.R. 35(A), the State was required to file a motion alleging that Antwon violated his probation, and pursuant to Juv.R. 35(B), the juvenile court was required to make a finding that Antwon violated a term of his probation of which he had been properly notified. But here, the State never filed a motion alleging that Antwon violated his probation and the court never found that Antwon violated a term of his probation before it committed him to DYS.

Antwon was adjudicated delinquent of a sexual offense on January 6, 2006. *In re Antwon C.*, 2009-Ohio-2567, 1st Dist. No. C-080847, ¶¶1-2. Immediately following

adjudication, the court held a dispositional hearing. *Id.* For disposition, Antwon was placed on probation. *Id.* at ¶1. At the conclusion of the disposition hearing on January 6, 2006, the juvenile court entered its “judgment,” as is required by Juv.R.34(C), which provides:

After the conclusion of the [dispositional] hearing, the court shall enter an appropriate judgment within seven days. [* * *] In all cases where a child is placed on probation, the child shall receive a written statement of the conditions of probation. If the judgment is conditional, the order shall state the conditions. If the child is not returned to the child’s home, the court shall determine the school district that shall bear the cost of the child’s education and may fix an amount of support to be paid by the responsible parent or from public funds.

Juv.R. 34(C).

Therefore, in its January 6, 2006 entry, the juvenile court entered a complete “judgment” as is required under Juv.R 34(C) when it ordered that:

1. Antwon to be placed on probation.
2. As a condition of probation, Antwon was to attend and complete the residential program at Hillcrest and to follow all rules and regulations of the placement facility and to adhere to all aftercare requirements.
3. Probation supervision was to be provided by Hillcrest.
4. Antwon’s parent was ordered responsible for medical, dental, and clothing expenses.
5. Winton Woods School District was ordered to bear the costs of education and to release all educational, behavioral, and psychological records to Hillcrest Training School.
6. Court costs were remitted because Antwon was found to be indigent.
7. A commitment to the custody of the Ohio Department of Youth Services was suspended on the condition that Antwon obey all the laws and orders of the court.

After it entered disposition, the juvenile court continued the matter for one purpose—sexual offender classification. But the decision to hold a classification hearing at a later date does not mean the trial court did not reach a “complete judgment” in the case.

When Antwon was returned to Ohio in 2008, the juvenile court held three hearings—a juvenile sex offender classification hearing pursuant to R.C. 2152.83, and two hearings which ultimately resulted in the court committing Antwon to the Department of Youth Services. The second and third hearings occurred completely outside the realm of Juv.R. 35; and therefore, the court was without jurisdiction to impose Antwon’s previously suspended commitment to DYS.

Without question, Antwon violated his probation when he absconded to Florida. But, because he faced a loss of liberty for violating his probation, he needed to be afforded the very basic due process protections that Juv.R. 35 provides. But, the First District’s decision in Antwon’s case presents dangerous precedent because it eradicates the protections that Juv.R. 35 provides for children who have committed a sex offense and are awaiting a juvenile sex offender classification hearing under R.C. 2152.83. Further, the First District’s decision effectively eliminates a juvenile sex offender’s right to appeal his or her disposition, as the Court of Appeals found that a dispositional order is not a “complete judgment” absent a determination as to the child’s sex offender classification.

Because this Court’s guidance is urgently needed to resolve the problems caused by the First District’s decision, Antwon asks this Court to accept review of his case.

CONCLUSION

This Court should accept Antwon C.'s appeal because it raises substantial constitutional questions, involves a felony-level offense, and is of great public and general interest.

Respectfully submitted,

OFFICE OF THE OHIO PUBLIC DEFENDER



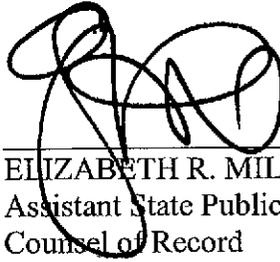
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CERTIFICATE OF SERVICE

The undersigned counsel certifies that a copy of the foregoing **Memorandum in Support of Jurisdiction of Minor Child-Appellant Antwon C.**, was served by ordinary U.S. Mail, postage-prepaid, this 20th day of July, 2009, to Paula Adams, Hamilton County Assistant Prosecutor, 230 East 9th Street, Cincinnati, Ohio 45202.



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**IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO**

IN RE: ANTWON C. : APPEAL NO. C-080847
 : TRIAL NO. 05-14749
 :
 : *DECISION.*
 :

Criminal Appeal From: Hamilton County Juvenile Court

Judgment Appealed From Is: Affirmed in Part, Reversed in Part, and Cause
Remanded

Date of Judgment Entry on Appeal: June 5, 2009

Elizabeth R. Miller, Office of the Ohio Public Defender, for Appellant Antwon C.,

Joseph T. Deters, Hamilton County Prosecuting Attorney, and *Paula E. Adams*,
Assistant Prosecuting Attorney, for Appellee State of Ohio.

Please note: This case has been removed from the accelerated calendar.

MARK P. PAINTER, Presiding Judge.

{¶1} Antwon C., a minor, was adjudicated delinquent because of a sexual offense and was placed on probation. He violated his probation. The trial court committed him to a term in the Department of Youth Services (“DYS”) and classified him as a Tier II sexual offender. Antwon now appeals. We affirm the delinquency adjudication and commitment, but we vacate his sexual offender classification and remand this case to the trial court.

I. Background

{¶2} In 2005, Antwon was adjudicated delinquent on a charge of gross sexual imposition.¹ At Antwon’s dispositional hearing, the trial court suspended a commitment to DYS, placed Antwon on probation, and ordered him to complete the residential treatment program at Hillcrest in Cincinnati. The trial court continued Antwon’s case for several weeks to determine his classification as a sexual offender. Between his dispositional hearing and his classification hearing, Antwon fled from the jurisdiction and went to Florida. The trial court issued a warrant for him.

{¶3} Soon after Antwon arrived in Florida, he was involved in an incident for which he was committed to a residential facility for two years. Antwon finished the program and was placed on probation in Florida. He finished high school, obtained employment, and enrolled in college.

{¶4} In June 2008, Antwon was stopped for speeding in Georgia. The police officer discovered that there was an outstanding warrant for Antwon in Ohio. Antwon was returned to Ohio. The trial court held dispositional hearings. In the first hearing, the magistrate classified Antwon as a Tier II sexual offender, noting that “[i]t’s a

¹ R.C. 2907.05.

mandatory classification.” At a second hearing, Antwon was committed to DYS for a minimum of six months or for a longer period ending with his 21st birthday.

{¶5} In this appeal, Antwon asserts that the trial court erred by (1) violating his due-process rights by failing to provide notice; (2) committing him to DYS; (3) failing to exercise discretion when it classified him as a Tier II sexual offender; and (4) denying him effective assistance of counsel.

II. Juv.R. 35 and Disposition

{¶6} Antwon argues that the trial court violated his due-process rights when it failed to comply with Juv.R. 35. He argues that the rule required the trial court to invoke its continuing jurisdiction and provide notice.

{¶7} Juv.R. 35 governs proceedings that take place after judgment. But Juv.R. 35 is not applicable to this case because Antwon fled to Florida before the trial court had reached a complete judgment.

{¶8} At the last hearing attended by Antwon, the trial court continued the case for 17 days to hold a hearing on Antwon’s sex-offender classification. But during those 17 days, Antwon fled to Florida, and the trial court was unable to address the final aspect of the case. Thus, the court was not required to comply with Juv.R. 35.

{¶9} Antwon also argues that the trial court erred by failing to impose the least restrictive disposition available. Under R.C. 2152.19(A)(4), the trial court had discretion to craft an appropriate disposition.² We will only reverse if we determine that the trial court’s decision was unreasonable, arbitrary, or unconscionable.³ Nothing in the record suggests that the court acted improperly. We overrule Antwon’s first and second assignments of error.

² *In re D.S.*, 111 Ohio St.3d 361, 2006-Ohio-5851, 856 N.E.2d 921, at ¶6.

³ *State v. Adams* (1980), 62 Ohio St.2d 151, 157, 404 N.E.2d 144.

{¶10} In his final assignment of error, Antwon argues that he was represented by ineffective trial counsel because his attorney failed to object to the trial court's failure to comply with Juv.R. 35. We have already determined that Juv.R. 35 did not apply. We overrule this assignment of error.

III. Classification

{¶11} Antwon argues that the juvenile court failed to use discretion when classifying him a Tier II sexual offender. We agree, so we must reverse the classification.

{¶12} R.C. 2950.01 creates three classification tiers for sexual offenders, each with a list of different enumerated offenses. For adult offenders, classification is automatic and based solely on the underlying offense.⁴

{¶13} Antwon argues in his brief—and the state conceded at oral argument—that the juvenile court has discretion to classify juvenile offenders under any of the three categories. Several Ohio appellate districts⁵ and the Ohio Attorney General⁶ have recognized that the statute treats juveniles differently.

{¶14} Since Antwon was 16 at the time of his offense, it was mandatory for the trial court to impose registration requirements on him.⁷ But the trial court was required to hold a hearing to determine in which tier to classify Antwon.⁸ If the tier classification was automatic for juveniles, it would have been pointless to hold a hearing to determine the classification—the trial court would have automatically assigned a tier after it had adjudicated Antwon delinquent for committing gross sexual imposition.

⁴ *In re G.E.S.*, 9th Dist. No. 24079, 2008-Ohio-4076, at ¶37

⁵ *In re Adrian R.*, 5th Dist. No. 08-CA-17, 2008-Ohio-6581, at ¶17; *In re P.M.*, 8th Dist. No. 91922, 2009-Ohio-1694, at ¶5; *In re A.R.*, 12th Dist. No. CA2008-03-036, 2008-Ohio-6566, at ¶36; *In re G.E.S.*, 9th Dist. No. 20479, 2008-Ohio-4076, at ¶37. But, see, *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 652, at ¶31; *In re S.R.B.*, 2nd Dist. No. 08-CA-8, 2008-Ohio-6340, at ¶7.

⁶ *Smith*, *supra* (amicus brief of Ohio Attorney General Richard Cordray supporting neither party).

⁷ R.C. 2152.83(A).

⁸ R.C. 2151.831.

{¶15} Our conclusion is bolstered by a reading of R.C. 2950.01. Sections (E), (F), and (G) of the statute define the three tiers through lists of enumerated offenses. Subsections (1) and (2) of these sections apply to adults. For example, R.C. 2950.01(F)(1) defines a Tier II offender as a sex offender who “has been convicted of, or has pleaded guilty to” a list of enumerated offenses. The classification under subsection (F)(1) is based solely on the offense for which the adult has been convicted.

{¶16} In Ohio, juveniles are not convicted of crimes. Instead, they are “adjudicated delinquent” for committing crimes.⁹ And R.C. 2950.01 provides an alternate means of classifying juvenile sex offenders. For example, R.C. 2951.01(F)(3) defines a Tier II sex offender as one who “is adjudicated a delinquent child for committing or has been adjudicated a delinquent child for committing any sexually oriented offense and who a juvenile court * * * classifies a tier II sex offender/child-victim offender relative to the offense.”

{¶17} In short, a juvenile sex offender is classified by being adjudicated delinquent *and* by being categorized by the trial court. The trial court has discretion to consider all relevant information and to appropriately categorize the juvenile.

IV. Invited Error

{¶18} We understand why the magistrate originally classified Antwon and stated that the classification was “mandatory.” In an amicus brief for a case before the Ohio Supreme Court on this issue, the Attorney General stated that a juvenile court has discretion to determine in which tier a delinquent child belongs. But he admitted that some of the confusion over the issue was the fault of the Attorney General’s office as a result of its release of a document meant to provide guidance about sex-offender

⁹ *State v. Hanning*, 89 Ohio St.3d 86, 89, 2000-Ohio-436, 728 N.E.2d 1059.

classification. Although that document stated that juvenile courts do not have discretion to determine tiers, the Attorney General, after reviewing the statute and various case law, concluded that the original interpretation was incorrect. The brief stated, “The relevant code provisions unmistakably afford discretion to the juvenile courts when fixing tier classification for juvenile offenders.”¹⁰

V. Appealability

{¶19} The state argues that the classification order is not appealable because it is not a final order—a mandatory reclassification hearing had not been completed.¹¹

{¶20} Juvenile sex offenders are afforded two classification hearings. First, under R.C. 2152.83, a juvenile is afforded a tier-classification hearing either as part of the child’s disposition or, if the child is committed to a secure facility, when the child is released. Second, under R.C. 2152.84, when a child completes all aspects of the disposition, including probation and any ordered treatment, the trial court “shall conduct a hearing” to consider the risk of reoffending so that the trial court can determine whether the order to register as a sex offender should be continued or terminated. Further, at the reclassification hearing, the trial court must determine whether the specific tier classification in which the child has been placed is proper and if it should be continued or modified.

{¶21} In this case, the trial court erred in two ways. First, under R.C. 2152.831 it exercised no discretion when it categorized Antwon as a Tier II sexual offender. Failing to exercise discretion due to an incorrect impression that discretion does not exist is almost always reversible error.¹² Second, R.C. 2152.83(A)(1) tells us *when* a trial

¹⁰ *In re Smith*, 120 Ohio St.3d 1416, 2008-Ohio-6166, 897 N.E.2d 652 (amicus brief of Ohio Attorney General Richard Cordray, at 12).

¹¹ R.C. 2152.84(A)(1).

¹² *State v. Zukowski*, 10th Dist. No. 06AP-4, 2006-Ohio-5299, at ¶9.

court should issue its classification order. If the juvenile does not serve time in a secure facility, the trial court “shall” issue the order as part of its disposition. But if the trial court commits a juvenile to a secure facility, the order “shall issue at the time of the child’s release from the secure facility.”¹³

{¶22} Thus, the court in this case should not have classified Antwon as a Tier II juvenile offender until he was released from DYS. We order the trial court to conduct a hearing and to exercise discretion to properly determine Antwon’s sex-offender registration status upon his release from DYS under R.C. 2152.82(A)(1). Antwon shall also receive a reclassification hearing under R.C. 2152.84(A)(1) when he finishes any probation and treatment ordered by the trial court.

{¶23} For the foregoing reasons, we affirm Antwon’s adjudication and commitment to DYS but reverse his sex-offender classification and remand the case to the trial court for the appropriate hearings to determine a sex-offender classification under the relevant statutes.

Judgment affirmed in part and reversed in part, and cause remanded.

SUNDERMANN and DINKELACKER, JJ., concur.

Please Note:

The court has recorded its own entry this date.

¹³ R.C. 2152.83(A)(1).